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1 IN THE CIRCUIT COURT OF SHELBY COUNTY, TENNESSEE
2 FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

3
4 BOBBY NEWCOMB,
5 Plaintiff,

T.D.

6
7 R.J. REYNOLDS TOBACCO COMPANY, and
8 THE BROWN AND WILLIAMSON TOBACCO
9 COMPANY, as successor by merger to
THE AMERICAN TOBACCO COMPANY,

10 Defendants.

11
12
13 Before: The Honorable D'Army Bailey
14
15

16 TRANSCRIPT OF PROCEEDINGS
17

18 April 21, 1999
19 (Morning Session)
20

21 Volume 50
22
23

24 ALPHA REPORTING CORPORATION
25 (901) 523-8974
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1

2 EDITH KARNEY, Individually, and
3 On behalf of the Estate of
4 JAMES WILEY KARNEY,
5 Plaintiffs,
- vs - Case No. 89196-8

T.D.

6 PHILIP MORRIS, INC., and
7 PHILIP MORRIS COMPANIES, INC.,
8 Defendants.

9
10 RUBY SETTLE, Individually, and
11 On behalf of the Estate of
RAYMOND SETTLE,
12 Plaintiffs,
- vs - Case No. 89226-8

T.D.

13
14 B.A.T. INDUSTRIES, PLC; BATUS HOLDINGS,
INC.; BROWN & WILLIAMSON TOBACCO
15 CORPORATION; BRITISH AMERICAN TOBACCO
COMPANY, L.T.D.,
16 Defendants.
17

18 DENISE McDANIEL, Individually,
19 and On behalf of the Estate of
20 FLORENCE BRUCH,
21 Plaintiff,
- vs - Case No. 90832-8

T.D.

22 BROWN AND WILLIAMSON TOBACCO
23 CORPORATION, and
24 PHILIP MORRIS, INC.,
25 Defendants.

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Southern Registered Reporters

21
22
23
24
25 7935
(At 10:35 a.m., on the 21st day of
April, 1999, Court met, pursuant to adjournment,
when and where the following proceedings occurred,
to wit:)
(Out of the presence of the jury.)
THE COURT: All right. Mr. Hardy, I see
you're on your feet.
MR. HARDY: Yes, Your Honor. I had
several matters I wanted to mention, and I'll deal
with them as fast as I can.
To start off on an unhappy note, I
just -- I want to make a record about something
that happened yesterday. I'm not asking the Court
for any relief. But I think I need to make a
record on this. When Exhibit 382 was offered into
evidence, there was a bench conference at which it
was agreed and ruled that part three on pages 2

and

18 3 would be deleted. Those were redacted. Those
19 were pages pertaining to lobbying Congress and
20 legislation. And I had raised the objection based
21 on Noerr-Pennington.

22 When Counsel began showing the exhibit
23 and discussing it with the witness in front of
24 jury, he first told the jury or said in front of
25 the jury that I had wanted Congressional

7936
1 legislative material taken out of the document and

2 then about 30 seconds later again referred to the
3 Congress reference being deleted at my request.
4 And I think that's improper.

5 THE COURT: I recall that, and I agree
6 with you. I thought that those comments were
7 inappropriate. I don't think -- I suspect they
8 were harmless in the context of the jury making

any

9 meaning out of them, since there hasn't been any
10 discussion in the presence of the jury as to
11 lobbying or Noerr-Pennington. And I don't see how
12 the jury can interpret it with any substantive
13 content as it relates to the lobbying element.

14 Actually there has been some reference

in

15 some of the defense proof, although not much, but
16 some as to testimony before Congressional
17 Committee, which is to say that I -- I don't know
18 that the jury can make much of that one way or the
19 other. But I tend to agree with you.

20 But we didn't hear from Mr. Wilner. But
21 I did hear your comments, and I follow what you
22 said.

23 MR. WILNER: Your Honor, if I said
24 anything improper, I apologize. It was not my
25 intent. I did not intend and I don't remember

7937

1 saying any particular person removed it. I was
2 trying to be scrupulously fair when I represented
3 to the Court what we were doing because we had
4 document which we had taken some parts out. It
5 wasn't clear what we were doing. I was trying to
6 be as neutral as possible and not trying to blame
7 him. That's what I was trying to do. If that

came

again.

8 across wrong, my apologies. It won't happen
9 THE COURT: I didn't interpret it to be
10 specific to any one lawyer or any one defense, but
11 the transcript speaks for itself in that regard.

12 MR. HARDY: I won't belabor it.
13 Second point, counsel did meet

yesterday,

14 Mr. Wilner and I, immediately after court, as the
15 Court had instructed. We did discuss documents.
16 Plaintiffs Counsel provided us promptly with
17 information yesterday evening about which

documents

18 they intended to use. Initially that was a list
19 some 47 documents beyond what had already been
20 into yesterday.

21 Mr. Wilner and I further discussed this
22 this morning for about a half an hour, and I
23 understand the number is pared down substantially
24 from that. And I had informed him which of the
25 documents he intends to use I intend to object to

7938

1 and why so that when and if he presents a
2 particular document to the witness I will know
3 immediately if I have an objection and what it is.
4 It will require, I think, in each instance

5 approaching the bench. I don't know how
6 much -- how time consuming that will be because I
7 don't really know how many he intends to offer.

8 It is my understanding or at least it is
9 my hope that we can finish Dr. Carchman today, so
10 he doesn't have to come back next week. And
11 Mr. Wilner has advised that he intends to try to

do

12 that.

13 With that being said, I'll go on to the
14 next topic, unless you want to add something?

15 MR. WILNER: Only that I intend -- I'm
16 planning to finish before lunch, but depending on
17 when we start. That may not happen. But that's
18 what I hope to do.

19 MR. HARDY: All right. That brings me
20 to --

21 THE COURT: Well, I'll just say this
22 about the documents: As we have done -- As has
23 been my inclination at this stage, I'm not

inclined

24 to take a lot of time trying to rack my brain to
25 figure out some evidentiary basis that doesn't

just

7939

things,

1 leap out at me with regard to some of these
2 particularly inasmuch as the submissions are in
3 some respects in the nontraditional manner.

tolerant

4 I've attempted to be liberal and
5 with regard to trying to allow the broadest scope
6 of proof to be presented. But I do not see that
7 we're going to bog down today in argument over
8 these documents.

9 MR. HARDY: And the next point,
10 Your Honor, our last witness will be Dr. Seiden, a
11 psychiatrist. We had intended to bring Dr. Seiden
12 in yesterday so that he could testify today when
13 and if Dr. Carchman was completed, with time
14 remaining in the day. We learned, however, that
15 Dr. Seiden is under a federal court subpoena to
16 testify in a federal court case unrelated to
17 tobacco, in Shreveport, Louisiana, and is
18 testifying as we speak. Therefore, it is not
19 possible for us to produce the witness today, if
20 there should be any remaining court time today.

So

21 I wanted to advise the Court of that because we
22 have ourselves in a position where we can't put

our

23 last witness on, since there's no court tomorrow,
24 until first thing Monday morning.

25 THE COURT: That will be fine. Anything

7940

1 else?

2 MR. HARDY: A couple things just
3 briefly. As Your Honor knows, there's a 48-hour
4 witness and exhibit or document list. And I just
5 want to be sure on the record that it's understood
6 that that applies to rebuttal witnesses and that

if

7 plaintiff intends to seek leave to call a rebuttal

8 witness next week, we would -- we would like to
9 have as much notice as possible. I think 5:00
10 o'clock Friday would be their deadline. If we can
11 learn of that earlier, it would help, because I
12 believe there's a significant chance that the
13 defendants would want to raise a question as to
14 whether it was a proper rebuttal witness. So we
15 would like as much notice as we could get in order
16 to deal with that.

17 Finally --

18 MR. WILNER: Excuse me, Your Honor.

19 MR. HARDY: Yes.

20 MR. WILNER: Agreed, with one humble
21 exception; and, that is, if there's a rebuttal to
22 the witness who has not even testified yet, the
23 doctor who's coming Monday -- We don't know in
24 advance whether we might need a rebuttal to that
25 witness because the witness hasn't testified yet.

7941

1 With the exception of that, then, we agree should
2 we intend to call a witness to rebut any of the
3 matters that have been presented, we would need to
4 disclose -- we would fully intend to disclose
5 that --

6 THE COURT: I understand.

7 MR. WILNER: -- at the proper time.

8 THE COURT: Well, that sounds reasonable
9 to me. Mr. Hardy, what do you say?

10 MR. HARDY: It sounds reasonable to me.

11 THE COURT: All right.

12 MR. HARDY: At some point today -- and I
13 don't suggest that this is the time, but perhaps
14 when the Court's getting ready to send the jury
15 home at the end of the day, if there's something
16 the Court could say about the progress of the
17 trial, we would appreciate it.

18 It is our concern that because of the
19 fact that the representation was made to them
20 earlier that we were going to finish in two weeks
21 and we haven't quite made that, under the
22 circumstances I'm just concerned that they'll

think

23 for some reason that the defendants are

responsible
24 for the additional time.

25 I don't have any particular statement in
7942

1 mind. I would just like for the Court to consider
2 the possibility of something along those lines.

3 And then, finally, Mr. Wilner and I also
4 talked this morning about a prospective schedule
5 for the end of -- the conclusion of the trial.

And

6 I think -- And then I spoke with cocounsel for the
7 defendants, and I think we arrived at at least an
8 idea of a scenario that I would just mention
9 briefly to the Court for your consideration. And
10 that is that assuming Dr. Carchman is off the

stand

11 and Dr. Seiden is concluded on Monday, and with or
12 without a short rebuttal by --

13 THE COURT: I'm sorry. Just a minute.
14 Who's your next witness? Doctor -- Give me his

15 name again.

16 MR. HARDY: Seiden, S-e-i-d-e-n.

17 THE COURT: And what is his area of
18 expertise?

19 MR. HARDY: Psychiatrist.

20 THE COURT: All right. And that will be
21 Monday presumably?

22 MR. HARDY: Yes, Your Honor.

23 THE COURT: All right. And is he your
24 last witness?

25 MR. HARDY: Yes, Your Honor.

7943

1 THE COURT: All right.

2 MR. HARDY: So apart from anything we
3 might want to offer by way of judicial notice, I'm
4 not sure at this point there will be anything.

But

5 it would be a matter of a few minutes if there
6 was. We would be resting then.

7 THE COURT: All right. Okay.

8 MR. HARDY: Our suggestion then was
9 whatever was left of Tuesday and Wednesday be
10 utilized for motions and jury instructions, which
11 in view of the three cases I think will be rather
12 lengthy -- the jury instructions, that is. And
13 that the closing arguments occur on Monday, May
14 3rd, and Tuesday, May 4th, at a length equal to
15 that of opening statements which was three hours
16 per side.

17 THE COURT: All right. But, now, before
18 we get that far, let me just understand, now,

after

19 you presented Dr. Seiden, Mr. Wilner, do you know
20 now or do you feel prepared to let us know what
21 number of rebuttal witnesses you would be prepared
22 and propose to present next week? Obviously not
23 talking about Dr. Seiden.

24 MR. HARDY: Your Honor, at this point we
25 do not have the plans to call rebuttal on what has

7944

1 been said so far in trial, except at least by way
2 of a witness, we do have some document
3 housekeeping. We do have some documents that we
4 had marked for identification that we will be
5 moving in. We have probably a few documents in
6 rebuttal that we'll offer. But right now it is

our

7 present position, subject to change, but present
8 good faith position that we do not have a rebuttal
9 witness at this time.

10 THE COURT: All right. So then if by
11 chance we were to finish on Monday or Tuesday, we
12 could then excuse the jury so that we could cover
13 motions, which I shouldn't think would take us

more

14 than half a day, if that long, as much as we've
15 been arguing the law all the way down through the
16 trial anyway. So then discussion of the charge

and

17 that will probably take, I would imagine, could
18 take us up to a day anyway. And in that regard I
19 would ask that you lawyers present me any special
20 charges that you want by Monday morning at 10:00.

21 MR. HARDY: Yes. We'll be happy to do
22 that.

23 THE COURT: All right. Now, let me just
24 tell you this: I tend to prefer to use the
25 standard TPI charges generically, except as to

7945

1 matters that must be handled specially. And
2 obviously there will be some items of law that

will

3 have to be specially crafted for the jury in this
4 case.

5 One of the things -- When did the
6 Minnesota or these multidocuments become
7 disclosed? Were they in the Minnesota trial?

8 MR. HARDY: I'm not sure of the timing.

9 MR. WILNER: Your Honor, there actually
10 have been several disclosures, but one major one
11 occurred as a result of the settlement of the
12 Minnesota case where there was established a

public

13 depository which would, by order of the court, be
14 open to all, and that the defendants were directed
15 to put their materials in there.

16 There was a subsequent and further
17 disclosure that was signed as a result of the
18 master settlement agreement with all the states,
19 including Tennessee, which required that the
20 defendants place the documents that they
21 have -- have ever produced in any case into that
22 repository and, further, to make them available to
23 the public on the Internet.

24 THE COURT: All right.

25 MR. WILNER: And that occurred, I think,
7946

1 last -- pieces of that were put in within a month
2 after the signing or two months after the signing
3 of the master settlement agreement among the
4 states. And the Internet sites have been -- Just
5 as a technological issue, the Internet sites I

know

6 have been revised several times. And I think the
7 latest revision happened within the past few
8 months.

9 And, Your Honor, not to belabor, and I
10 don't really want to go -- I think we have
11 together, Mr. Hardy and I, resolved all with but
12 one or two authentication issues. So I don't mean
13 to rehash this, and I won't, except we do have a
14 pleading where we in Memphis requested documents
15 and were referred to the Minnesota registry, which
16 was, I think, the proper response and a good faith
17 response and certainly nothing we would challenge,
18 because that is where the documents have been
19 deposited. And it would be improper for us to

say,

20 no, I want you to go and make more copies at our
21 expense or your expense to copy what we already

had

22 or -- and was accessible. And that was my only
23 point.

24 Now, I think Counsel's point
25 yesterday -- and I also take that in good

7947

1 faith -- was that they could not affirmatively
2 state that that was produced into the Minnesota
3 depository. And I was unable to produce proof

that

4 it was. In that situation I think that I have to
5 produce proof, at least that they produced it as
6 accordance with that -- with their agreement to do
7 so. And so I'm not trying to reargue that.

8 I would only say that if, in fact, they
9 have produced it and I can prove it, as part of

the
not
from
to

10 court order, into a public depository, that may

11 be admissibility, but that should be at least the
12 first step about that the paper didn't blow in

13 the street. But I don't think we'll really need

14 address that very much because I think Mr. Hardy
15 and I have agreed on at least 95 percent of what
16 we're going to talk about.

17 MR. HARDY: Your Honor?

18 THE COURT: Yes, sir.

19 MR. HARDY: I assume Mr. Wilner's

talking

20 about a request for production or some sort of
21 discovery in some other Memphis cases than these.

22 MR. WILNER: Yes.

23 MR. HARDY: And my point is -- And my
24 point was yesterday that no request for
25 production -- no request for admission, that the

7948

1 records were business records, authentic,
2 foundation, nothing was asked in this case.

3 And my whole point yesterday, apart from
4 my lack of familiarity with the particular

document

5 we were talking about at the time, is that it's
6 inappropriate and improper for the plaintiff to
7 conduct no discovery and then just come in,
8 basically say, "Well, all I have to do is say that
9 this came from a certain location," and opposing
10 counsel must then accept it as an officer of the
11 court and either affirm or deny that to the Court.
12 All he has to do is propound the interrogatories

or

13 the requests to us as part of the trial. And
14 that's the proper thing to do. And that's how we
15 got into that argument yesterday.

16 THE COURT: Well, going back just for a
17 minute to the charge, when did the Minnesota trial
18 start?

19 MR. WILNER: Started a
20 year -- about -- Was it a year ago? Two years
21 ago. It's ended.

22 MR. HARDY: It started in late 97 or
23 early 98.

24 MR. WILNER: Right. January of 98, I
25 think, when they started it. And they finished it

7949

1 in May of 98.

2 THE COURT: Well, one of the things -- I
3 guess the reason I'm asking that is one of the

4 things we'll need to address -- and I'm sure it
5 will come up when we're dealing with motions
6 pertinent to the statute of limitations that would
7 also bear on the charge, and that will be as it
8 relates to the claims of fraud and concealment and
9 the notice element. No one should have known in
10 terms of -- and how evidence is going to be framed
11 according to the law. It may appertain too to the
12 availability, it occurs to me, of these documents
13 or the awareness of -- to the public of some of
14 these documents and the information contained
15 therein as they relate to the charges.

16 So I think that's something that we'll
17 have to assess, I'm sure, when we're dealing with
18 our motions.

19 Now, back to the issue about the
20 documents, I guess we'll just have to see what
21 comes up and what Mr. Wilner wants to introduce

and
that

22 basics for it. And I understand your position
23 the rules of foundation apply. And just a
24 reference to something that's been introduced in
25 other litigation is not going to be sufficient.

7950

1 MR. HARDY: That's correct, Your Honor.
2 And I have told -- Mr. Wilner understands which
3 ones I have a foundation objection to, which ones

I

4 have a relevancy objection to and so forth.

5 MR. WILNER: Yeah. I think we're only
6 talking about three foundation out of maybe a set
7 of 15 that we talked about. So I don't think that
8 that's going to be a problem. If I can't lay the
9 foundation, I won't offer the document.

10 THE COURT: All right.

11 MR. CURTIS JOHNSON: Your Honor, just a
12 quick question. On the pattern jury instructions,
13 is the Court using the third edition of the
14 instructions or the second?

15 THE COURT: That's a good question. I
16 tend to prefer some of the language in the second
17 just because I think for a lay jury it's a little
18 bit more ordinarily written. But that's just a
19 matter of style. Obviously the law is of -- The
20 third edition will be the law that will apply.

But

21 the matter in which it's stated I may prefer some
22 of the language of the second. So -- I'll
23 generally work from the second edition. But if
24 there's some difference in the law and the third
25 edition, then I'll incorporate the third edition

7951

1 charges as a part of the charge.

2 But, as I said, I do -- be mindful so we
3 won't have to spend a lot of time on the charge
4 that if I -- if it appears that the generic
5 presentation of the TPI patterns will cover the
6 issue of law sufficiently to the jury, then I tend
7 to opt for that as opposed to getting into

specific

8 detail in the charge.

9 And so I guess then if we look at

Tuesday

10 and Wednesday for the discussion of the charges,
11 that will leave us Thursday. And so the
12 suggestion, Mr. Hardy, that we do the closings on
13 Monday and Tuesday the following week, is that --
14 MR. HARDY: Yes, Your Honor. May 3 and
15 4th.

and
latitude

16 THE COURT: I think that makes sense,
17 that keeps us from -- and it gives us some
18 to work with on any of those things that may take
19 more time.

have

20 MR. HARDY: And one other final question
21 in that regard, is it the Court's intention to
22 the jury deliberate on a Friday if -- if a Friday
23 comes up and there has been no verdict at that
24 point?

to
inclined

25 THE COURT: Yes.

7952

1 MR. HARDY: Thank you.
2 THE COURT: And I also might say this,

3 the maximum extent possible, I am probably

4 to use a general rather than an interrogatory
5 verdict form, so you may also be mindful of that.

6 All right. Are you all ready for the
7 jury?

8 MR. WILNER: Yes, Your Honor.

9 MR. HARDY: Yes, Your Honor.

10 THE COURT: All right.

11 MR. HARDY: Your Honor, should we bring
12 in the witness?

13 THE COURT: Yes, please.

14 You all remain seated.

15 (Whereupon, a brief recess ensued.)

16 (Whereupon, the jury was seated in the
17 jury box.)

18 THE COURT: Remain seated.

19 Good morning, ladies and gentlemen.

20 THE JURORS: Good morning.

21 THE COURT: Thank you for being back in

a

22 timely manner, and we are ready to continue. And
23 when we finished yesterday, Mr. Wilner was in the
24 middle of his cross-examination of Dr. Carchner
25 [sic].

7953

1 And, Mr. Wilner, you may continue.
2 Dr. Carchner, you're still under oath
3 from yesterday.

4 MR. WILNER: Thank you, Your Honor.

the

5
6 RICHARD ALLAN CARCHMAN, Ph.D.,
7 having been previously duly sworn by the Clerk to
8 tell the truth, the whole truth and nothing but

9 truth, returned to the witness stand and testified
10 as follows:

11 CROSS-EXAMINATION (Cont'd.)

12 BY MR. WILNER:

13 Q. Good morning, Doctor.
14 A. Good morning, sir.
15 Q. We'll try to move this along just as

fast

16 as we can and get you home.
17 A. Thank you.
18 Q. When we left yesterday we just put up
19 Dr. Wakeham's document from 1969 where he had said
20 we have got to -- And on the second page, We've

got

21 to begin testing our products. The conclusion is
22 inescapable from all this -- is inescapable. We
23 should start testing our products now because it
24 will be two years before we know the answer. And
25 that was in 1969. Remember that?

7954

1 A. Yes, sir.
2 Q. And did you say why you thought
3 Dr. Wakeham, who is head of the research and
4 development department, then wanted to begin
5 testing the products?

6 A. By mouse skin painting?
7 Q. By whatever was available at the time?
8 A. This -- If I remember correctly, this
9 particular memo was specifically referring to the
10 mouse skin painting. And I think it seems evident
11 here, since at that time it took about two years

to

12 do the assay, if you're going to use that assay

you

13 needed to start testing whatever -- whatever it is
14 you want right now, because it's going to take two
15 years to get the results using this particular
16 assay.

17 Q. I wasn't going after the two years. Why
18 would you want to do it at all?

19 A. I'm sorry. The purpose of what was

going

20 on with regard to cigarette design changes was to
21 do testing. Here he's talking about a specific
22 kind of test that he is talking about doing
23 evaluations on right now because of the lead time
24 assessed with it. He's not talking about not

doing

25 any kinds of test. He's talking about doing this

7955

1 kind of test.

2 Q. Well, let's stick to what we've got
3 here. Why would he want to start doing tests?

4 A. It's not a question of why would he want
5 to start doing tests. Why would he want to start
6 doing this particular test.

7 Q. All right. Let's have it your way. Why
8 would he want to start doing this particular test?

9 A. Well, if we go back to the previous page
10 of this memo, he goes through an explanation of
11 why. And I think at the time it was not an
12 unreasonable -- not an unreasonable expression by
13 Dr. Wakeham that, look, everybody is doing this
14 now. We have problems with this assay. We have
15 disagreements with it. But we ought to consider
16 using this assay now in addition to whatever else
17 we're doing to evaluate our product design

18 changes.

19 Q. Now, would it be proper if Philip Morris
20 were doing its research to -- not to develop a
21 safer product necessarily or not to develop a

22 product, but instead to -- to defend against the
23 public health community's publications that show
24 that cigarettes were harmful?

25 A. If that was the only purpose, it would

7956

1 not be proper.

2 Q. Now, do you agree that Philip Morris
3 engaged in research specifically to try and refute
4 the Surgeon General?

5 A. Philip Morris -- No, I don't. And the
6 reason I don't is that whatever research
7 Philip Morris engaged in at two fronts: One was

8 to evaluate whatever product designs they had; and,
9 two, when there was a publication dealing with a
10 particular assay or a particular result,
11 Philip Morris felt it had a responsibility to
12 investigate that particular assay or result and
13 then see whether, in terms of its own

understanding

14 of the assay, those conclusions were supported by
15 the data.

16 Q. Well, how about instead to counter the
17 attacks?

18 A. The only appropriate use of
19 Philip Morris's evaluation of the science in
20 addition to product design changes would be if in
21 its estimation, carrying out a particular
22 evaluation of somebody else's work, if there were
23 significant problems or flaws either with a

design,

24 the experiment or the conclusions, I think it's
25 appropriate for anybody, Philip Morris or anybody

7957

1 else, whether it's a company or A university or a
2 scientist, to voice an opinion.

3 Q. Did Philip Morris believe internally

that

4 the public health community, including the
5 Surgeon General, was attacking him?

6 A. I've never sensed that, no.

7 Q. All right. Let me show you a series of
8 documents.

9 MR. WILNER: Thank you, Sheriff.

10 MR. HARDY: May I see those again,
11 please? I didn't know you were going to hand them
12 to him in a series.

13 MR. WILNER: Sorry.

14 MR. HARDY: I have no objection to that.

15 MR. WILNER: Do you want to do it one at
16 a time? All right.

17 MR. HARDY: Yeah.

18 Q. BY MR. WILNER: Now, as I hand you that,
19 I need to ask you another question. Remember you
20 talked about INBIFO, I-N-B-I-F-O?

21 A. Yes, sir.

22 Q. That's the German organization, right,
23 part of Philip Morris now?

24 A. Yes.
25 Q. And I think you said that that was doing
7958

1 research for Philip Morris, right?

2 A. It still is, yes.

3 Q. Okay. And that when INBIFO was formed,
4 was it formed to hide research that Philip Morris
5 didn't want to do over here because they were
6 afraid they might get caught?

7 A. Philip Morris was in existence before
8 Philip Morris purchased it.

9 Q. I didn't understand that.

10 A. You asked me --

11 MR. HARDY: I think the witness

misspoke,

12 Your Honor. I think he meant to say INBIFO. He
13 said, "Philip Morris was in existence before
14 Philip Morris" --

15 THE WITNESS: Forgive me. INBIFO was in
16 existence before Philip Morris purchased it. I'm
17 sorry.

18 Q. BY MR. WILNER: Okay. But what I asked
19 you is, did Philip Morris buy INBIFO so that it
20 could send stuff overseas so it wouldn't get

caught

21 with material it didn't want other people to see?

22 A. No.

23 Q. Now --

24 A. No.

25 Q. Okay. Would you look at the document I
7959

1 just gave you, dated February 24th, 1970, from
2 Joseph Cullman to Helmut Wakeham?

3 A. Yes.

4 Q. Now, you remember who Joseph Cullman
5 was? He was the -- at this point, 1970, he was
6 head of the whole company, right?

7 A. Yes, sir.

8 Q. And Helmut Wakeham was head of the
9 research and development department, right?

10 A. Yes, sir.

11 Q. And Cullman writes to Wakeham, and in
12 this document is it not -- is it signed by

Cullman?

13 A. Yes.

14 Q. And is it discussing in general the
15 matters such as INBIFO and the company's policies
16 on research?

17 A. Yes.

18 MR. WILNER: Offer it as the next
19 number. Would like to show it.

20 MR. HARDY: No objection.

21 Q. BY MR. WILNER: Now, does it say --

22 MR. HARDY: Let's get a number first.

23 (Whereupon, Exhibit Number 387 was

marked

24 for identification and admitted into evidence.)

25 Q. BY MR. WILNER: All right. Now, this is
7960

1 just a few months -- Let me get the exact date.

2 This is the few months -- a few months after the
3 1969 letter where Wakeham says, "We've got to

4 start" -- "The conclusion is inescapable; we've

5 got to start testing," right?
6 A. This is one -- about one year later, a
7 few months --
8 Q. One year later. Okay. So, now, Cullman
9 begins to talk. And he says: "I enjoyed our
10 conversation last Thursday in Richmond, and I hope
11 that you feel it will serve to clear the air
12 somewhat on the strong stand I have taken in
13 connection with certain kinds of research
14 activities by Philip Morris."
15 Now, were you -- Have you seen this
16 document before?
17 A. I've been shown this document by
18 lawyers.
19 Q. By lawyers? Did you not find it when
you
20 reviewed the history of the company?
21 A. I didn't review the history of the
22 company. I reviewed scientific documents within
23 R&D and INBIFO.
24 Q. Well, what kinds of research did the
head
25 of Philip Morris, Joseph P. Cullman, what kind of
7961
1 research was he talking about when he said certain
2 kinds of research he's taken a strong stand on?
3 A. I don't recall specifically. But I
4 believe there are earlier memos between these two
5 gentlemen in which this is -- this is discussed.
6 And off the top of my head, I couldn't tell you.
7 But I know there are other documents that I've
been
8 shown in the same context that talk about this.
9 Q. Well, he's talking about testing the
10 products over here and getting bad results that's
11 going to fall into the hands of the public health
12 community; isn't that right?
13 A. I don't know if that's what it is. If
14 there's a document that speaks to that, we can
talk
15 about it. But I know there are other documents
16 that precede this that are somewhat more
17 illuminating than just watching this and trying to
18 speculate about what -- about what he meant.
19 Q. Well, based on all the documents you
20 reviewed, are you disagreeing with me that what
21 Cullman is saying is we don't want to do certain
22 tests over here?
23 A. It's not a question of agreeing or
24 disagreeing. All I'm saying is that there are
25 prior documents that more clearly answer or get
7962
1 closer to answering the question you're addressing
2 rather than focusing on this document, that all I
3 can do is tell you I can't remember specifically
4 what he was talking about.
5 Q. All right. Well, if you have more
6 documents, you let us know. But let's do this:
7 "You have given me a better understanding of the
8 rationale behind your position, and I repeat my
9 assurances to you that my position is not
10 intransigent, and I'm willing to discuss broad
11 corporate policy in this area with you" -- "with

12 you, Ross and Cliff at regular intervals."
13 Now, does this indicate to you that
14 Wakeham had one position and Cullman, the boss,

had

15 another?

16 A. I think that, again, there are prior
17 documents and where they're discussing positions.
18 And their positions -- Dr. Wakeham wants to do
19 certain things in a certain way, and Mr. Cullman

is

20 asking him to provide additional rationales for it
21 because he's, I believe, expressing some questions
22 about this. And this is just another one of those
23 documents. And he says he's not intransient
24 [sic]. It would seem to me that Dr. Wakeham is
25 starting to have an impact on Mr. Cullman's

7963

1 attitudes.

2 Q. Okay. So I feel our present
3 position -- I feel -- "In the meantime, I feel our
4 present policy is the correct one and that
5 the" -- "and that the program you are carrying out
6 in Boston is as far as we should go now." Right?

7 A. That's what it says.

8 Q. So he didn't want Wakeham to go any
9 further, right?

10 A. Well, if that's the only piece of this
11 you read, I would say you're right. But if you go
12 above where he says "I'm not intransient [sic],"
13 and you have the other documents that precede

this,

14 you, I think, get a better sense that what Wakeham
15 is talking about is clearly much broader than some
16 limited program that Mr. Cullman seems to be
17 focusing on in this one part of this one sentence
18 of this document.

19 Q. Well, the document we just looked at a
20 year ago said that -- Wakeham says, "The

conclusion

21 is inescapable. We've got to start testing." And
22 now Cullman says the program you're now carrying
23 out is as far as we can go.

24 A. But he also says above that, and you

read

25 it, that I'm not intransient [sic]. And there's a

7964

1 whole dialogue that's been going on here either
2 prior to this -- not either -- prior to this, this
3 one and subsequent to this.

4 Q. Well, Doctor, that's what we're trying

to

5 illuminate here. So let me go --

6 MR. WILNER: Ms. Stieger, please slide
7 that up a little.

8 Q. BY MR. WILNER: Now, he says: "The
9 possibility of getting answers to certain problems
10 on a contractual basis in Europe appeals to me and
11 I feel presents an opportunity that is relatively
12 lacking in risk and unattractive repercussions in
13 this country." Now, what -- what unattractive
14 repercussions could come from Dr. Wakeham's
15 research?

16 A. I guess there could be any -- any

17 number. But I think the answer to the question
18 would be requiring Mr. Cullman to answer the
19 question, rather than me going back almost 30

years

20 and trying to figure out what was in his head at
21 the time.

22 Q. So you have -- And you have talked about
23 what Philip Morris has done over the years, right?

24 A. Yes.

25 Q. And your understanding of Philip Morris

7965

1 is not consistent with these historical documents,
2 is it?

3 A. No. It's not consistent with your
4 interpretation, your suggestions about what

certain

5 words or parts of sentences might or might not
6 mean.

7 Q. Well, what are your suggestions to what
8 it means? "I feel it presents an opportunity in
9 Europe that's lacking in risk and unattractive
10 repercussions in this country." What could he
11 mean?

12 A. Well, what could it mean? I think,
13 again, just reflecting back in the ten years I was
14 there, first of all, almost 1 million INBIFO
15 documents are available in this public -- public
16 depository.

17 Number two, when I first came to
18 Philip Morris and started reading the INBIFO
19 documents, there were these numbers on the sides

of

20 some of these INBIFO documents. I didn't know

what

21 they were. I ignored them. Several years later I
22 found out they're Bates numbers, which meant they
23 were INBIFO documents that had been turned over in
24 some -- in some litigation.

25 Thirdly, the research activities that

7966

1 Mr. Wake -- Dr. Wakeham was planning to carry out
2 regarding cigarette design -- and there are memos
3 that occur about this time between these two
4 gentlemen where Dr. Wakeham was talking about the
5 fact that the laboratories that are available on a
6 worldwide basis to do this kind of testing are
7 limited and getting smaller and the number of
8 people asking for the use of these laboratories is
9 increasing, and some of these laboratories are
10 having difficulty in terms of keeping up with the
11 work. So you have to wait in line to do it.

12 Fourthly, that to do work in these
13 laboratories by Philip Morris would make available
14 in terms of security some of the cigarette design
15 changes that we were doing potentially to our
16 competitors who would be using the same facility.

17 So those would be at least four examples
18 I can think of off the top of my head.

19 Q. And those are unattractive

repercussions?

20 A. If one of our competitors found out what
21 we were doing on a cigarette design change, I

think

22 so.
23 Q. Lacking in risk?
24 A. Yes.
25 Q. And you said that you saw some of these

7967

1 documents that showed up in litigation?
2 A. Yes.
3 Q. And your -- And from that you understand
4 that the INBIFO documents were public because they
5 were subpoenaed in litigation?

6 A. There were 800,000 -- over 800,000

INBIFO

7 documents sent in the Minnesota depository.

8 Q. Since when?
9 A. Whenever that was required.
10 Q. 1998.

Counsel

11 MR. HARDY: Excuse me. Object to

12 testifying, if that's a question.

13 Q. BY MR. WILNER: Well, when did you
14 first --

15 THE COURT: Well, overruled.

16 Q. BY MR. WILNER: Wasn't that 1998?

17 A. It was recently, yes.

18 Q. All right. We're talking about things
19 that were talked about in 1970. Was it their
20 intent to conceal these in 1970?

21 A. No. As I said to you, when I came to
22 Philip Morris over ten years ago and read INBIFO
23 documents, they had already been provided in other
24 litigation based upon the Bates stamp numbers
25 they've -- that were printed along the bottom of

7968

1 the documents.

2 Q. And that was 1988. So you're now saying
3 they meant to conceal them in 1970, but somebody
4 subpoenaed them in 1988?

5 A. No. You're saying that. All I'm saying
6 is when I came in in actually 89, these documents
7 already existed. And they were older documents.

I

8 I don't know. I never asked for what case they were
9 subpoenaed. It was not of interest to me at the
10 time nor is it now.

11 Q. Let me hand you another document on the
12 same issue and clear it up. 137. Thank you.

13 Now, is this a letter from Wakeham to
14 Mr. C. H. Goldsmith of Philip Morris?

15 A. Yes, sir.

16 Q. Does it have Philip Morris letterhead on
17 it?

18 A. Yes.

19 Q. And it's dated April 7th, 1970?

20 A. Yes.

21 MR. HARDY: I have no --

22 (Discussion off the record.)

23 MR. WILNER: Okay. We offer page 1 as
24 our next numbered exhibit.

25 MR. HARDY: No objection.

7969

marked

1 (Whereupon, Exhibit Number 388 was
2 for identification and admitted into evidence.)

3 Q. BY MR. WILNER: All right. Doctor, I'll
4 move through this fast. This is more going on
when

5 INBIFO was actually bought, right? This is what
6 was going on when INBIFO was purchased by
7 Philip Morris, right?

8 A. This is, I think, just prior to that. I
9 believe that's correct.

10 Q. And actually Wakeham says that we can
11 buy -- Actually for \$190,000, and its price
12 includes physical laboratory and good will and all
13 this.

14 MR. WILNER: And if you would slide that
15 up, Ms. Stieger.

16 Q. BY MR. WILNER: And it says: "Since we
17 have a major program at INBIFO and since this is a
18 locale where we might do some of the things which
19 we are reluctant to do in this country, I
recommend

20 that we acquire INBIFO either in toto or to the
21 extent of a controlling interest." Do you see
22 that?

23 A. Yes, sir.

24 Q. What things were they reluctant to do in
25 the United States of America?

7970

1 A. Actually the things -- the answers I
2 gave you to this February 24th, 1970, memo, I
just
would

3 give you the same answers that I gave you on that.
4 Q. Okay. Let me hand you another document
5 dated March 31st, 1977. And is this a letter from
6 Robert B. Seligman also Philip Morris?

7 A. Yes, sir.

8 Q. This is up to 1977?

9 A. This was an unsigned letter, at least
10 that's based on the copy. It's hard to read this.
11 But this is two pieces of paper with a date on it,
12 but it's not -- at least my copy is not signed.

13 Q. Does that bother you?

14 A. Yes.

15 Q. Oh, you mean you don't think it was sent
16 to Dr. Max Hausermann of Philip Morris
17 Europe S. A.?

18 A. I would have no idea.

19 Q. Well, let's go on the assumption that
20 when Robert B. Seligman types his name down there,
21 that this is just a poor copy and we can't see his
22 signature. But let's go forward on that
23 assumption. Is there something -- Do you have
some

24 evidence that this document was not sent?

25 A. Well, all I can tell you is in my

7971

1 experience at Philip Morris unsigned letters or
2 unsigned memos generally aren't sent.

3 Q. Do you mean he would put this letter and
4 then say "attachments" and then just leave it in
5 the file?

6 A. I really don't know.

7 Q. Well, let's just see how reasonable that
8 is, Doctor. If -- Who is the addressee, Dr. Max

9 Hausermann?
10 A. Pleaserman (phonetic).
11 Q. Pleaserman. Philip Morris S. A., do you
12 know who that is?
13 A. Yes.
14 Q. Research and Development, Post Office
15 Box 11, 2003 Neuchatel, Switzerland?
16 A. Neuchatel.
17 Q. Neuchatel. Is that the correct address?
18 It would get there if sent?
19 A. It would get there even without the
20 address. Just putting Philip Morris and

Neuchatel,

21 it would get there.
22 Q. "Dear Max," is that how he refers to Max
23 as?

24 A. They're good colleagues.

25 Q. And do you know the subject matter of

7972

1 this letter? Have you seen this letter before?
2 A. Again, I've been shown this letter in
3 litigation.

4 MR. WILNER: Okay. I move this in.

5 MR. HARDY: No objection.

6 THE COURT: All right.

7 (Whereupon, Exhibit Number 389 was

marked

8 for identification and admitted into evidence.)

9 Q. BY MR. WILNER: Now, this is seven years
10 after they buy INBIFO, right?

11 A. Yes, sir. Well, I think they bought
12 INBIFO in 71, 72. But close enough, yes.

13 Q. I received a copy of Helmut Gaisch's
14 letter of March 24th, letter to Jerry Osmolov.
15 Who's Jerry Osmolov?

16 A. I don't know who Jerry Osmolov is. I
17 know who Helmut Gaisch is.

18 Q. All right. "Concerning pesticide

residue

19 analyses. As you were copied, you know that
20 Helmut was requesting we send samples directly to
21 INBIFO. This suggested procedure is in direct
22 conflict with our communications with the New York
23 office." Where is Philip Morris's office?

24 A. New York.

25 Q. "We have gone to great pains to

eliminate

7973

1 any written contact with INBIFO, and I would like
2 to maintain this structure." Now, is that true?

3 A. Not in the ten years I was with the
4 company, no.

5 Q. Well, what would be the
6 purpose -- Assuming that this is correct, what
7 would be the purpose in Philip Morris going to
8 great pains to eliminate any written
9 contract -- any written contact with INBIFO who
10 they just bought?

11 A. Wouldn't make any sense.

12 Q. So you -- your understanding of things
13 cannot be -- be jibed with this historical record?

14 A. No.

15 Q. All right. "Therefore, I'm advising

16 Jerry Osmolov to continue sending samples to
17 Neuchatel for transshipment to INBIFO. If this
18 procedure is unacceptable to you, perhaps we

should

19 consider a dummy mailing address in Koln for the
20 receipt of the samples."

21 Now, why would they be setting up dummy
22 mailing addresses?

23 A. Beats me. I really don't know.

24 Q. Okay. Let me hand you another document.

25 Have you seen that document before?

7974

1 A. Yes. Again, under the same
2 circumstances.

3 Q. All right. And the circumstances were
4 what?

5 A. Litigation. Plaintiffs' lawyers have
6 shown this to me.

7 Q. And have you verified that this document
8 occurs in the files of Philip Morris?

9 A. I've been shown this document. I have

no

10 way -- no way of knowing whether this is an
11 official Philip Morris document or not.

12 Q. You have no way. I thought you had
13 access to the files?

14 A. As I said to you, the -- I had access to
15 the files. My job was to deal with the science.

I

16 focused on the scientific information in R&D and

17 INBIFO.

18 Q. Well, if you focused on INBIFO, would

you

19 be concerned if documents were being destroyed at
20 INBIFO?

21 A. Of course.

22 Q. Okay.

23 MR. HARDY: Your Honor, I think at this
24 point I have an objection to any further questions
25 unless he establishes proper foundation.

7975

1 MR. WILNER: I'm in the middle.

2 THE COURT: Let me see the document,

3 Sheriff.

4 Well, I'm going to allow him to go a
5 little bit farther, Mr. Hardy, but without
6 reference to the content of the document. And
7 let's see what his foundation is.

8 Q. BY MR. WILNER: Did you ever investigate
9 the question of whether documents were destroyed

at

10 INBIFO?

11 A. Yes.

12 Q. And, in doing so, did you review the
13 files of Philip Morris?

14 A. I reviewed -- I reviewed the document
15 system both in Richmond and in INBIFO.

16 Q. What do you mean "the document system"?

17 A. Just that, there are document policies
18 and document systems in both -- in both places. I
19 looked at those policies. I looked at those
20 systems. I've looked at the documents.

21 Q. Did you --
22 MR. HARDY: Excuse me, Your Honor. I
23 understood the Court's ruling to mean that
24 Mr. Wilner was permitted to ask a foundation
25 question about the witness's ability to identify

7976

1 what that document is.

2 MR. WILNER: I am, Your Honor. I'm
3 trying to get there.

4 THE COURT: Well, I would suggest you
5 hasten to that point.

6 Q. BY MR. WILNER: Did you review the
7 documents of Dr. Thomas Osdene who testified in
8 this case?

9 A. I have reviewed memos from Dr. Osdene.

10 Q. And how did you get to reviewing memos

of

11 Dr. Osdene?

12 A. They were contained in the files of
13 Philip Morris.

14 Q. And did you review the files of
15 Philip Morris to find out what Dr. Osdene was

doing

16 about documents from INBIFO?

17 A. As far as I can remember. I don't

recall

18 reading any -- any documents prepared by Dr.

Osdene

19 or sent to doctor --

20 THE COURT: I think at this point we're
21 going to sustain the objection to the document

with

22 regard to foundation.

23 MR. WILNER: May I just ask him,
24 Your Honor, if he recognizes the handwriting on
25 it?

7977

1 THE COURT: Well, you can ask him that.

2 That would be more direct and to the point.

3 Q. BY MR. WILNER: Do you recognize the
4 handwriting on this document?

5 A. No.

6 Q. Did you take any steps to find out when
7 it was shown to you earlier?

8 A. You mean, who wrote this document?

9 Q. Yeah.

10 A. No, sir.

11 Q. Okay.

12 THE COURT: All right. Let's go on.

13 Let's take a ten-minute recess.

14 (Whereupon, the jurors were excused from
15 the courtroom.)

16 (Whereupon, a 25-minute recess ensued at
17 11:33 a.m.)

18 (Out of the presence of the jury.)

19 THE COURT: Ready for the jury?

20 MR. WILNER: Yes, Your Honor.

21 MR. HARDY: Yes, Your Honor.

22 (Whereupon, the jury was seated in the
23 jury box.)

24 THE COURT: Thank you.

25 Mr. Wilner, you may continue.

7978

1 MR. WILNER: Thank you, Your Honor.
2 Q. BY MR. WILNER: Doctor, remember
3 yesterday we talked about Philip Morris providing
4 psychological crutch to its consumers?

5 A. No, I don't.
6 Q. You don't remember that whole

7 A. Not about Philip Morris. I remember a
8 letter from Mr. Weissman to somebody elsewhere.
9 Mr. Weissman uses that term. But that was one
10 person writing -- I think it was to Mr. Cullman,

1 a matter of fact. You described it as a
2 discussion. But it was Philip Morris. But it
3 seemed to me it was one person. But that's my
4 recollection.

15 Q. And that one person was the person who
16 was in charge of Philip Morris at the time, wasn't
17 it?

18 A. No. The -- Well, it was Weissman to
19 Cullman. Cullman was really the top dog, if you
20 will.

21 Q. In 1967. And that was 1966, and

22 was the CEO, and Cullman was the vice CEO; isn't

34 A I don't know

Q. You just tried to testify. You don't

7979

1 know, do you?

2 A. No. I didn't remember the year. But
3 Cullman was the top dog. I don't believe --

4 Q. When that letter was written Weissman

5 the CEO and Cullman was the vice CEO?

6 A. I don't know that.
7 Q. Okay. You don't know one way or the
8 other, do you?

8 Singer, as you:
9 ^ That's correct

10 Q. All right. And if Weissman was the CEO
11 in charge of Philip Morris, your position still is
12 it's just one man's opinion?

13 A. If he was the CEO of Philip Morris, I
14 don't remember him ever being the CEO of
15 Philip Morris. It is his opinion -- I don't
16 remember seeing any response from Mr. Cullman, nor
17 do I remember seeing anything in terms of the
18 company's behavior that would say that anybody
19 acted upon that one way or the other.

20 Q. Well, if your boss tells you that this

21 the policy, what are you supposed to do?
22 A. I don't know that Mr. Weissman was

23 Mr. Cullman's boss.
24 Q. Doctor, let's discuss it from this point

1 research to counter the attacks being launched
2 against its products, that that would be a method
3 of supplying a psychological crutch to its
4 smokers?

5 A. It might be considered that, yes.

6 Q. Okay. So let's go back to what has been
7 marked in evidence as our first number today,
which

8 is the letter from Joseph Cullman to
9 Helmut Wakeham, dated February 24th, 1970. What I
10 didn't read the first time through, and I
11 apologize, is?

12 MR. WILNER: Ms. Stieger, if you would
13 slide it up a little? Thank you.

14 Q. BY MR. WILNER: And this is -- Remember,
15 this is Cullman, who is now at this time head of
16 the company, telling Wakeham, "I would also like
17 you to continue to keep us fully informed on
18 research developments that you think would help
19 Philip Morris and the industry to counter the
20 attacks being launched against our products." Do
21 you see that?

22 A. Yes, sir.

23 Q. Is that what Philip Morris's research
was

24 for?

25 A. As I said earlier, the only two things
7981

1 that Philip Morris did, as far as I can tell from
2 the research documents and from the people I spoke
3 to, if somebody -- if somebody published a
4 document, a report or a study, Philip Morris would
5 investigate. If there was a problem with that
6 report, then they would comment on it. If there
7 was no problem with it, they wouldn't comment on
8 it.

9 Q. Well, I guess my question is broader.
10 Did Philip Morris have the intent to go out and do
11 the kind of research that I thought would help to
12 counter the attacks being launched against its
13 product?

14 A. No. I think they evaluated all the
15 research and all of the allegations that were
16 mounted against either the company or the product,
17 as you would expect anybody to be able to do.

18 Q. And these attacks, they came from
19 the -- as you've said, the public health
community,

20 including the Surgeon General, right?

21 A. I didn't say that.

22 Q. Well, do you say it now?

23 A. I wouldn't -- I wouldn't call them -- I
24 wouldn't call them attacks.

25 Q. Well, the head of Philip Morris called
7982

1 them attacks, didn't he?

2 A. Well, he doesn't really specify who
3 they're coming from as far as I can tell here.

4 Q. Well, who were they coming from?

5 A. Well, I don't know.

6 Q. You don't know?

7 A. In 1970 what was in Mr. Cullman's mind,
8 how could I possibly know that?

9 Q. So when he says you don't think -- "help
10 counter the attacks being launched against our
11 products," you don't understand that to mean the
12 attacks of the public health community and the
13 Surgeon General?

14 A. It could very well be, but I don't know
15 that for a fact.

16 Q. Could very well be. All right. In
fact,

17 the Surgeon General had continued to publish in
18 1964, 1967, right? 1969, correct?

19 A. Yes.

20 Q. And all these were consistent with the
64 report and, in fact, amplified it, right?

21 A. Yes.

22 Q. And all of them agree that cigarette
23 smoking was causally related to lung cancer,
24 correct? Correct?

7983

1 A. If we -- If we reflect back on the basis
2 for the Surgeon General's 64 report, then my

answer

3 is yes.

4 Q. And they all followed up on that with
5 more and more research and disclosure, true?

6 A. Yes.

7 Q. And Philip Morris's head or the head of
8 Philip Morris at this time told Wakeham to go back
9 and see if he could do some research to counter
10 this, right?

11 A. Well, that's -- that's your suggestion,
12 sir. But I will just submit that the significant
13 amount of research funded either directly or
14 indirectly by Philip Morris found its way into the
15 U.S. Surgeon General's reports over the years,
16 hardly what I would consider consistent with
17 countering, if the U.S. Surgeon General is
18 incorporating that information into their reports.

19 Q. Well, citing something in the
20 Surgeon General's report does not necessarily mean
21 it's cited with approval, does it?

22 A. It's not a question of approval or
23 disapproval. The question you're asking me is
24 countering the U.S. Surgeon General's report. If
25 you look at the scientific documents that the U.S.

7984

1 Surgeon General incorporated that were funded in
2 part or directly by Philip Morris, those were
3 documents that the U.S. Surgeon General felt were
4 of a sufficient quality to be included in their
5 report and deal with their evaluations at the
6 time. And they dealt with tobacco and smoking.

7 Q. And how much was funded by Philip Morris
8 that never saw the light of day?

9 A. In terms of smoking and health?

10 Q. Correct.

11 A. I'm sorry?

12 Q. Correct.

13 A. I don't know. I can't give you a number
14 to that.

15 Q. You said "funded indirectly"; you
16 remember that?

17 A. I did.

18 Q. What were you speaking of when you said
19 "funded indirectly"?

20 A. Through the Council of Tobacco Research,
21 for example.

22 Q. The CTR?
23 A. Yes, sir.
24 Q. So Philip Morris was one of the sponsors
25 of the CTR of course, right?

7985

1 A. Yes, sir.
2 Q. One of the people in it from the
3 beginning, right?
4 A. Yes, sir.
5 Q. Contributed money and had -- and had a
6 direction in which way it was going, true?
7 A. Not -- not that part of the CTR I'm
8 referring to.
9 Q. Well, let me ask you this: Would you

say

10 that according to Philip Morris the purpose of the
11 CTR was to find evidence which denies the
12 allegation that cigarette smoking causes disease?

13 A. I've seen documents --
14 MR. HARDY: Your Honor, excuse me.
15 THE WITNESS: Sorry.
16 MR. HARDY: Excuse me. I would like to
17 object to this and ask to approach the bench.
18 THE COURT: All right.
19 (Whereupon, the following discussion

took

20 place at the bench.)
21 MR. HARDY: Do you have a clean copy of
22 that document?
23 MR. WILNER: Well, I don't know that
I'll
24 need the document if he agrees with me.
25 MR. HARDY: Here's the basis for my

7986

1 objection, Your Honor. Obviously the issue of CTR
2 has some relevance in this case, but I did not ask
3 this witness any questions at all on direct
4 examination about CTR. I never mentioned CTR in
5 any way.

6 And I believe what Mr. Wilner is trying
7 to do now is to set up by asking questions from
8 a -- from a particular Philip Morris document that
9 involves a discussion by CTR, and I have the
10 document here. He's trying to set it up so he can
11 put that document in through Dr. Carchman.

12 I believe that if the document is
13 relevant and should come into evidence -- whether
14 it is or not, stands or falls without regard to
15 Dr. Carchman, and I don't think we should -- I
16 don't think it's proper to go into this topic with
17 the witness since I didn't do it on direct at all.

18 THE COURT: Well, I'm kind of at a loss
19 because I don't know what the document is. Do you
20 have the document?

21 MR. WILNER: Well, I do have a document.
22 I have many documents. But so far I've just asked
23 him a question about the CTR. But that is a
24 document from Philip Morris, which Counsel has
25 agreed is authentic and correct. So I may -- I

may

7987

1 ask him to look at it. It depends on what he
2 says.

3 MR. HARDY: The document was offered by
4 plaintiffs' counsel on March 12th to the Court and
5 excluded at that time on the basis primarily the
6 foundation. And I have advised Counsel that I do
7 not have any foundation objection anymore. But my
8 objection is that it's marginal relevance. It
9 involves just a sort of a think piece by
10 Dr. Wakeham, his ideas about various things that
11 CTR could be, what its purpose is, what he thinks
12 its purpose ought to be, what are the various
13 alternatives.

14 MR. WILNER: Well, that goes to --

15 MR. HARDY: And I think it has, at best,
16 marginal relevance. But I don't know how to make
17 that point without allowing the Court to read the
18 document.

19 MR. WILNER: A, I haven't offered it.
20 But, B, that goes to weight. If he wants to say,
21 "Well, it wasn't acted on, or it's just a think
22 piece," I think that's fine. But those are
23 arguments that the trier of fact has to resolve.

24 MR. HARDY: Again, my point is that this
25 document should come in or be excluded without

7988

1 regard to Dr. Carchman.

2 MR. WILNER: Maybe it will be when we

get

3 to that. But, Your Honor, if only to say that
4 while the CTR witness was up we couldn't discuss
5 this document because we couldn't lay a foundation
6 to who Wakeham was. Now we have a Philip Morris
7 person who can say who Wakeham was.

8 MR. HARDY: I've waived that objection.

9 MR. WILNER: No. I understand. That's
10 why it's coming up now. And it wasn't able to be
11 brought up earlier because it was objected to, and
12 we couldn't do anything with Wakeham, so now we
13 can.

14 MR. HARDY: I think we're going to be
15 here for a considerable length of time if we're
16 going to deal with the CTR on a witness who has

not

17 dealt with CTR at all.

18 MR. WILNER: Well, he mentioned it just
19 now on indirect. And I have one paragraph that I
20 want to read to him and that is all.

21 MR. WILNER: He mentioned it because you
22 asked him about it.

23 THE COURT: Just a minute. Which
24 paragraph are you talking about?

25 MR. WILNER: Right here. That's the

7989

1 Paragraph Number 2. That's the only one I can --

2 MR. HARDY: As I say, Your Honor, I
3 believe that the document stands or falls without
4 regard to Dr. Carchman. And I must say that this
5 particular document -- more damage would be done
6 by -- there would be a greater prejudicial effect
7 and misleading effect to simply let him put in

that

8 one paragraph.

9 THE COURT: Well, I'm going to allow him
10 to -- to ask as it relates to this Paragraph 2.

16 Philip Morris research was designed to counter the
17 public health community, and now we're going to
18 talk about whether CTR research was designed to do
19 that too.

20 A. That was your question.

21 MR. WILNER: Okay. I move it in.

22 THE COURT: Is there objection?

23 MR. HARDY: I don't have anything to add
24 to what I said at the bench, Your Honor.

25 THE COURT: Why don't you lawyers come

7992

1 back and approach.

2 (Whereupon, the following discussion

took

3 place at the bench.)

4 THE COURT: Now, I -- Let me be clear.

5 My ruling was not at that point -- Although now I
6 have to consider whether to allow the document as
7 an exhibit. But I was only allowing him to
8 question the witness with respect to that
9 paragraph.

10 MR. WILNER: I understand.

11 THE COURT: So that's why I don't know
12 quite what your position is as far as the exhibit
13 on it, which goes beyond what I ruled on
14 previously.

15 MR. HARDY: I understand, Your Honor.

MY

16 position is that is sort of a think piece by
17 Dr. Wakeham offering various alternatives,
18 possibilities for the use of CTR to Dr. Cullman or
19 to Mr. Cullman. And as such I think it has, at
20 best, marginal relevance. That's --

21 MR. WILNER: We would say that goes to
22 the weight. He can certainly testify to that.

23 THE COURT: Well, if that's the only
24 basis of your objection, then --

25 MR. HARDY: Well, I think it is.

7993

1 THE COURT: All right. Then I'll allow
2 it in.

3 (Whereupon, the bench conference is
4 concluded.)

5 THE COURT: All right. We'll have the
6 document marked.

7 (Whereupon, Exhibit Number 390 was

marked

8 for identification and admitted into evidence.)

you

9 Q. BY MR. WILNER: All right, sir. Now,
10 are familiar that in this period of time
11 Dr. Wakeham was discussing with the head of the
12 company, Mr. Cullman, what might -- what the
13 company's position on this CTR should be. Do you
14 remember that?

15 A. Yes, sir.

16 Q. And they say: In retrospect the
17 November 30 meeting of the CTR Executive

Committee,

18 it might be appropriate to comment on the

question,

19 what kind of CTR program is best for the industry?
20 Do you see that?

21 A. Yes, sir.
22 Q. Has that always been the belief at
23 Philip Morris, what kind of program is best for
the
24 industry?

25 A. I don't know the answer to that.

7994

1 Q. Well, has -- has Philip Morris ever said
2 what kind of CTR program is best for its customers
3 and their health?

4 A. The way CTR is set up, the company
5 provided money to CTR. And the outside Scientific
6 Advisory Board, which is not made up of anybody
7 from the industry, the very prominent scientists
8 from around the country, that got in applications,
9 and they decided where the money -- where the

money

10 went.

11 So to the extent that we provided money
12 amongst -- amongst others and somebody else

decided

13 where that money was spent and how it was meant, I
14 don't -- I don't understand how that relates to
15 this question.

16 Q. Well, so you don't understand what
17 Dr. Wakeham could possibly be meaning when he says
18 what kind of CTR program is best for the industry?

19 A. Well, I can see from the dimension that
20 if we're providing money, what are we getting out
21 of it. And that is not an unreasonable question

to

22 ask.

23 Q. Well, has it -- was it asked in terms of
24 what is the health of our customers? How is the
25 health of our customers benefitting from it?

7995

1 A. Actually, in looking through the rest of
2 this document, Dr. Wakeham raises a series of
3 options because he basically says in here that
4 there were a variety of opinions expressed -- I
5 would have to go back and find it -- which would
6 mean that different people, whoever was a part of
7 this in terms of financial contributions, had
8 different opinions. And he goes through a variety
9 of options. And some of those options that he's
10 talking about go directly to the consumer.

11 Q. All right. Well, let's see what they
12 are. Number 2: It has been stated that CTR is a
13 program to find out, quote, the truth about

smoking

14 and health.

15 And it has been stated, hasn't it,
16 publicly by the cigarette industry and by CTR,
17 right?

18 A. I believe that's correct, yes.

19 Q. "What is truth to one is false to
20 another. CTR and the industry have publicly and
21 frequently denied what others find as truth."

Now,

22 that's true, isn't it?

23 A. I believe there are circumstances where
24 that's clearly the truth, yes.

25 Q. "CTR and the industry have publicly and

1 frequently denied that cigarettes cause cancer."

2 True?

3 A. Does that -- you're not going to read --

4 Q. I'm asking you, isn't that true?

5 A. Could you repeat it, please?

6 Q. Never mind.

7 "Let's face it. We are interested in
8 evidence which we believe denies the allegation
9 that cigarette smoking causes disease." Now, is
10 that consistent with your understanding of
11 Philip Morris's policy towards the CTR?

12 A. As I told you, Philip Morris's policy,

as

13 far as I know, is to provide money for outside
14 scientists, then distribute it to who they felt
15 were worthwhile scientific research projects.

16 Q. Let me see if I can clarify my question.
17 Is that consistent or inconsistent with your view
18 of what Philip Morris's policy is?

19 A. I think it's inconsistent.

20 Q. Inconsistent?

21 A. That the only thing that Philip Morris

is

22 interested in is evidence which denies the
23 allegation.

24 Q. All right. I'm just trying to make this
25 straight. You think it's inconsistent, right?

1 A. Yes.

2 Q. All right. So your view of the
3 historical record is inconsistent with the
4 historical documents?

5 A. As --

6 Q. Isn't that true?

7 A. As you're reading this one particular
8 document, yes.

9 Q. Well, sir, we can only read one at a
10 time. Have you been inconsistent with more than
11 one?

12 MR. HARDY: Objection.

13 MR. WILNER: Never mind, withdraw it.

14 THE COURT: Sustained.

15 Q. BY MR. WILNER: Let's look at
16 Mr. Cullman. Now, remember Mr. Cullman was the

one

17 who Helmut Wakeham wrote in 1961, said we've got
18 carcinogens in the product we can't go out, right?

19 A. He wrote -- I remember that --

20 Q. Okay.

21 A. -- that memo, yes.

22 Q. And Mr. Cullman, then, in
23 1966 -- remember, he gave that speech. And he

said

24 if there's anything in the product, we think we
25 get it out, right?

can

1 A. This was the speech to the tobacco
2 growers?

3 Q. True.

4 A. Yes.

5 Q. Okay.

6 A. Uh-huh.
7 Q. And so what was Mr. Cullman's view in
8 1973 as we move up just a few more years?
9 A. You're asking me as I sit here today?
10 Q. Well, I don't know. You seem to feel
11 that Mr. Cullman had some change in position. You
12 testified to that earlier?
13 A. Yes. I testified to that yesterday.
14 Q. In fact, you said that he said before
15 some kind of a hearing that it was true that
16 cigarettes cause disease?
17 A. No. Actually what I said -- we can go
18 back to the record -- he very specifically said in
19 response to Mr. Dingle's question about the

warning

20 label at the time, "Would you agree that
cigarettes
21 may be injurious to health?" And he said, "Yes."
22 Q. Okay. Well, let's see what he said in
23 1973.
24 MR. WILNER: Counsel, do you mind?
25 MR. HARDY: No.

7999

1 MR. WILNER: Okay. I would like to hand
2 this to the witness.
3 Do you have yours? Thank you.
4 Q. BY MR. WILNER: Would you look at the
5 title to this and who wrote it, please?
6 A. Yes.
7 Q. Does it say Joseph F. Cullman the third,
8 chairman of the board, Philip Morris?
9 A. Yes, it does.
10 Q. Is there anybody higher up in
11 Philip Morris than the chairman of the board?
12 A. In the company, no.
13 Q. So he is the boss?
14 A. Yes, sir.
15 Q. And does it -- And the title of it is
16 "The Noncase against Cigarette Smoking"?
17 A. Uh-huh. That's what it says, yes.
18 Q. Is there a picture of Joseph Cullman on
19 page 2?
20 A. I believe so.
21 Q. Is he holding a cigarette?
22 A. And it's smoking, yes.
23 Q. And does this appear to be a printed
24 piece?
25 A. I have no idea what it is.

8000

1 Q. Well, you see it's not typed. It's a
2 printed document, correct?
3 A. Okay.
4 Q. Is that not clear to you?
5 A. It's a document, a copy of a document
6 that Mr. Cullman's picture and name appear on.
7 Q. All right. Would you turn to
8 the -- what's showing as page 15 of 17 in the
lower
9 left corner and verify the signature of Joseph F.
10 Cullman the third?
11 A. I can't verify his signature.
12 Q. Well, you can observe that he signed
this

13 document?
14 A. Page 5 of 17, did you say?
15 Q. Page 15 of 17.
16 A. Sorry. Yes.
17 Q. All right. And would you look at the
18 table of contents, please.
19 MR. HARDY: Your Honor, I think I want

to
20 object to this manner of questioning the witness
21 about the document. I think the proper thing to
do

22 is to ask him if he's seen it at this point to
23 establish foundation.

24 MR. WILNER: There's lots of foundations
25 besides whether he's seen it.

8001

1 THE COURT: Let me see the document,
2 Sheriff.

3 THE SHERIFF: Yes.

4 THE COURT: Objection overruled.

5 Q. BY MR. WILNER: I will ask you now, have
6 you seen this document?

7 A. No, sir.

8 Q. Have you looked for statements made by
9 the company appearing in --

10 A. Not generally, no.

11 Q. Okay. Would you look at the table of
12 contents, rather the first page of the document.

I
13 guess it doesn't have a table of contents. Just
14 the first page.
15 A. Yes.
16 Q. Does it appear to concern matters of the
17 public -- the company's public position or at
least

18 Mr. Cullman's position at that time on smoking and
19 disease?

20 MR. HARDY: Your Honor, may we approach?

21 THE COURT: You may.

22 (Whereupon, the following discussion

took
23 place at the bench.)
24 MR. HARDY: This is a new document.
25 "New" in the sense it was provided to me by

8002

1 Mr. Wilner yesterday. It was not part of the
2 exhibit list.
3 So I do not have any information about
4 this. I don't know whether this document ever
went

5 anywhere. I don't know whether it was a business
6 record of Philip Morris. I don't know whether it
7 was ever published. I don't know who it was
8 intended for.

9 And I think the fact that it -- the fact
10 that it is a document which appears to have been
11 signed by the president of the company is not
12 enough, unless there's some sort of indication

that
13 this document went out to the public or went to
14 somebody. We don't know whether it went to -- I
15 don't know where it came from. I don't know
16 whether it's a part of the business record of the

17 company. I know nothing about what -- about this.
18 I don't know what it says.

19 MR. WILNER: Well, signed by the CEO is
20 enough to determine what the CEO's beliefs were at
21 that time. And that's what we're asking about.

22 THE COURT: But what he's talking about
23 is authentication, I believe.

24 MR. WILNER: Well, I don't think he
25 said -- Well, it's self-authenticating. He's got
8003

1 his picture and his signature. It comes from

their

2 records. And I can verify it comes from their
3 records.

4 THE COURT: How can you establish --

5 MR. WILNER: I go back to that. And I
6 think we've got the -- I've got the document that
7 shows that it came from the site that they have

put

8 up specifically from the public. Furthermore,

it's

9 self-authenticating. I couldn't possibly create
10 it. He's verified that that's his picture. This
11 is his signature, which we can match with other
12 signatures on their annual reports.

13 I mean, it's a preposterous suggestion
14 that this is not authentic. It's preposterous.

15 MR. HARDY: I'm not contending that's

not

16 his signature. I'm not contending that's not his
17 picture. I don't know whether it was prepared by
18 Philip Morris or by an advertising agency. I

don't

19 know whether it ever went out. I don't know
20 whether it's a draft or a final. I don't know the
21 first thing about it.

22 THE COURT: Okay. Now, I don't think
23 he's required to establish all of that in order to
24 make it admissible evidence. So long as it is an
25 authentic representation of something that the
8004

1 president has produced, whether it's in-house, out
2 of house --

is

3 MR. HARDY: Well, Your Honor, my point
4 at this point I don't know whether this was
5 something that -- whether this was a work in
6 progress that was never finalized and never sent
7 out or whether, in fact, it was.

of

8 THE COURT: I don't think that makes it
9 inadmissible, that we don't know what the degree
10 circulation of it was, unless he attempts to
11 suggest without evidence as to what its
12 dissemination was. It --

it

13 MR. HARDY: But it has no relevance if
14 didn't go out to anybody.

15 THE COURT: Certainly. It would be
16 reflective of the person's thinking, even if it
17 went -- even if he prepared it and put it into a
18 file drawer, I would think. Again, I don't -- I
19 mean, I'm assuming that that's -- that he's not at

20 this point attempting to suggest that this
21 is -- that this was somehow disseminated. But
22 rather that he's going to the content of it as
23 reflected by the thinking of the president.

24 Now, if he wants to suggest
25 dissemination, then I think he's got to have some
8005

1 evidentiary basis for it.

2 MR. WILNER: All right.

3 MR. HARDY: Could I also, because of the
4 length of the document, ask to know what it is
that

5 Mr. Wilner intends to --

6 MR. WILNER: I have that written down up
7 front there, as I -- and I communicated that
8 earlier. I just don't -- I have that written on
my

9 notes. I have to go get my notes.

10 MR. HARDY: I just need to know what it
11 is he intends to offer.

12 THE COURT: Why don't you take a minute
13 back there and show him what it is you intend to
14 use.

15 (Whereupon, the bench conference is
16 concluded.)

17 MR. HARDY: Your Honor, there are about
18 seven pages here. And I don't know whether I have
19 an objection here or not. But, in view of the
20 time, could I have the noon recess to read this,
to

21 see whether I have an objection?

22 THE COURT: About how much more time do
23 you have, Mr. Wilner, in your cross-examination?

24 MR. WILNER: I'm hoping for about an
25 hour.

8006

1 THE COURT: All right. Let's go ahead
2 then, Sheriff, and we shall recess until
3 2:00 o'clock.

4 (Whereupon, the jurors were excused from
5 the courtroom.)

6 (Whereupon, the lunch recess ensued at
7 12:30 p.m.)

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8007

1 COURT REPORTER'S CERTIFICATE

2 STATE OF TENNESSEE:
3 COUNTY OF SHELBY:
4 I, LORI-ANN MASON, RPR, do hereby certify:
5 1. The foregoing transcript of proceedings
6 was taken before me at the time and place stated
in
7 the foregoing styled cause with the appearances as
8 noted;
9 2. Being a Court Reporter, I then reported
10 the transcript of proceedings in Stenotype to the
11 best of my skill and ability, and the foregoing
12 pages contain a full, true and correct transcript
13 of my said Stenotype notes then and there taken;
14 3. I am not in the employ of and am not
15 related to any of the parties or their counsel,

and

16 I have no interest in the matter involved.
17
18
19

20 Lori-Ann Mason, RPR
21 Notary Public at Large
22 State of Tennessee

23 My commission expires:
24 August 29, 2001
25

8008

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